IN RE DATO' DR ELAMARAN M SABAPATHY; EX P RHB BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
VARGHESE GEORGE JC
[BANKRUPTCY NO: D-29-1698-2009]
3 DECEMBER 2010

BANKRUPTCY: *Notice - Setting aside - Request for issue of bankruptcy notice signed by solicitors for judgment creditor ('JC') - Bankruptcy Rules 1969, Form 4 - Whether complied with*

BANKRUPTCY: *Creditor's petition - Lack of authority of person who signed petition - Factors to consider - Whether judgment creditor ('JC') showed proof of authority of person who signed CP - Effect of - Whether Bankruptcy Rules complied with - Bankruptcy Rules 1969, r. 215*

BANKRUPTCY: *Creditor's petition - Opposition to - Affidavit not attaching a copy of CP - Whether defect which had gone to substance matter - Factors to consider - Whether Bankruptcy Act and Bankruptcy Rules complied with - Whether judgment creditor ('JC') could have taken steps to correct the same - JC's failure to do so - Effect of*

BANKRUPTCY: *Creditor's petition - Affidavit verifying petition using words 'mengaku' and 'mengikrar' in separate places in same affidavit - Whether caused confusion - Evaluation of facts - Whether defect which had gone to substance of affidavit*

BANKRUPTCY: *Notice - Amount - Judgment amount entered in respect of three defendants - Whether defendants jointly and severally liable to judgment creditor ("JC") - Bankruptcy Notice issued against judgment debtor ("JD") for full amount of judgment - Whether JD indebted to JC for full amount of judgment or merely one-third of the same*

This was an appeal by the judgment debtor ('JD') against the decision of the learned Senior Assistant Registrar dismissing the JD's application to set aside both the bankruptcy notice ('BN') and the creditor's petition ('CP') issued against him (encl. 9). There were six grounds for this appeal: (1) that since bankruptcy proceedings were quasi-criminal in nature, the requirements of the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 had to be strictly complied with; (2) that the 'Request for Issue of Bankruptcy Notice' had been defective as it had been signed by the solicitors for the judgment creditor ('JC') without identifying the signatory and the defect had been one that had gone to the substance of the document; (3) that the CP had been invalid as the signatory to it had failed to provide his source of authority (which had to be under seal

in any event) together with the petition; (4) that the affidavit verifying petition accompanying the CP had not had the petition annexed to it and had thus not been in compliance with the strict formalities required to sustain the CP; (5) that in the affidavit verifying the petition, the defendant had used two different words 'mengaku' and 'mengikrar' in different parts of the affidavit and accordingly there had arisen a confusion as to whether the affidavit had been sworn or affirmed and (6) that the BN and CP had both referred to the judgment sum entered against the JD and two others in the KLHC which said judgment had been entered jointly against all three defendants and as such the total judgment sum as stated in the BN and CP could not be maintained against the JD as his liability to settle under the judgment had only been one-third of that amount.

Held (allowing JD's appeal with costs):

(1) A firm of solicitors could apply for the issue of a bankruptcy notice on behalf of their clients. Form 4 of the Appendix to the Bankruptcy Rules had clearly set out that the 'Request For Issue of Bankruptcy Notice' could be signed by the 'judgment creditor or solicitor for the judgment creditor'. (para 4)

(2) There was no confusion caused by stating on the Request in this case that the JC had been the applicant whilst the form had been signed for and on behalf of the entity by an identified firm of solicitors. The fact that the signatory on behalf of the identified firm of solicitors had not been specifically named had also not amounted to a sufficient ground to strike down the Request and consequently the BN itself. The names of the JC and the JC's solicitors had been provided and their identities had not been in any doubt. (para 4.1)

(3) The declaration by Aznan Adnan that he had been an authorized officer of the JD with his designation or office in the JC clearly spelt out, had been sufficient in all the circumstances to satisfy r. 215 of the Bankruptcy Rules. The Bankruptcy Rules had not in any way required proof of the 'authority under seal' to be made available at that stage. If the deponent's authority were challenged as in this case, then it would be incumbent upon the JC to show proof of the authority of the person who had signed the CP. This had been satisfied in this case. (para 5)

(4) The 'Affidavit Mengenai Kebenaran Pernyataan-Pernyataan Dalam Petisyen' had not attached or annexed a copy of the CP. After giving due consideration to the rationales propounded in the differing judgments above, the reasoning of Edgar Joseph J, would be preferred. Thus the affidavit verifying petition in the instant case had

not complied with the requirements of the Bankruptcy Act and the Bankruptcy Rules. Further, it had not been corrected by the JC although it could have done so. (para 6.3)

(5) As to the use of the words 'mengaku' and 'mengikrar' in separate places in the same affidavit, it had not caused confusion or had the effect of nullifying the affidavit verifying petition. If it had been a 'defect' it had merely been one in form only as opposed to one which had gone to the substance of the affidavit. Affidavits could be made either by affirmation or by swearing the contents thereof. The omission to annex the CP to the affidavit verifying petition on the other hand had been a matter that had gone to the materiality of the contents and had hence been a substantive matter. (para 6.4)

(6) There had not been anything in the judgment attached to the BN to show that the three defendants had been jointly and severally liable to pay the judgment sum to the JC. Thus the judgment had been one imposing joint liability or obligations on the three defendants to meet the judgment sum together. As such, the JD's obligation had only been towards one-third of the amount of the judgment sum and not as set out in the BN or the CP. (para 7.1)

Case(s) referred to:

Cho Yu-Lon v. Arab-Malaysian Finance Bhd [2003] 2 CLJ 186 HC ***(refd)***

J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA ***(refd)***

Ooi Thean Chuan v. Banque Nationale de Paris [1992] 2 CLJ 1225; [1992] 3 CLJ (Rep) 160 HC ***(refd)***

Re Lai Hua Kian, Ex P Credit Corp (M) Bhd [1990] 1 LNS 38 HC ***(refd)***

Re Puan Sri Mona Kishu Thiratrai, Ex P Affin Bank Bhd [2007] 7 CLJ 657 HC ***(refd)***

UMW Industries (1985) Sdn Bhd v. Lim Chee Hian [2005] 1 CLJ 173; [2005] 1 CLJ 319 CA ***(refd)***

For the plaintiff/applicant - Hapizi Hasim; M/s Sidek Teoh Wong & Dennis
For the defendant/respondent - T Gunaseelan; M/s Gunaseelan & Assocs

Reported by Sharmini Pillai

JUDGMENT

Varghese George JC:

[1] This was an appeal by the judgment debtor (JD) against the decision of the learned Senior Assistant Registrar dismissing encl. 9. Enclosure 9 was an application by JD to set aside both the bankruptcy notice dated 30 April 2009 and the subsequently issued creditor's petition dated 7 August 2009.

[2] The JD's contentions were essentially as follows:

(a) As bankruptcy proceedings were quasi-criminal in nature, the requirements of the Bankruptcy Act 1967 and the Bankruptcy Rules, 1969 must be strictly complied with. (*Jf Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104 - Court of Appeal)

(b) The 'request for issue of bankruptcy notice' was defective as it was signed by solicitors for the JC without identifying the signatory. This defect was not merely a formal defect but one which went to the substance of that document. Consequently the bankruptcy notice issued pursuant to that request was ineffective.

(c) The creditor's petition was also invalid as the signatory to the creditor's petition on behalf of JC, although identified by name (Aznan b Adnan) had failed to provide his source of authority (which had to be under seal in any event) together with the petition.

(d) The affidavit verifying the petition, accompanying the creditor's petition did not also have the petition itself annexed to it and accordingly there was non-compliance to the strict formalities required to sustain the creditor's petition.

(e) In the affidavit verifying the petition - the defendant had further used two different words 'mengaku' dan 'mengikrar' in different parts of the affidavit and accordingly there arose a confusion as to whether the "affidavit' was being sworn or affirmed. The affidavit was therefore not in order and should not be accepted.

(f) The bankruptcy notice and the creditor's petition both referred to the judgment sum of RM514,972.63 together with interest and costs entered against the JD and two others in KL High Court (Bahagian Dagang) Guaman No: D3-22-1580 of 2006 on 30 April 2009 as the debt of the JD. The said judgment was however one which was entered jointly against three defendants in that proceedings. The JD here was only one of the three judgment-debtors and the total judgment sum cited in the bankruptcy notice and creditor's petition could not be maintained against the JD as the JD's liability to settle under that judgment was in any event only one-third that amount, unlike the situation if it was a joint and several judgment.

[3] After hearing respective counsel and after taking into consideration the decided authorities cited by them, I held as set out below.

[4] I accepted counsel for JC's submission that a firm of solicitors could apply for issue of bankruptcy notice on behalf of their clients. Form 4 to the appendix to the bankruptcy rules clearly provides for this and the decision in *Re Lai Hua Kian, Ex P Credit Corp (M) Bhd* [1990] 1 LNS 38 supported this position. The Form 4, provided as guidance, clearly sets out that the 'request for issue of bankruptcy notice' could be signed by 'judgment creditor or solicitor for the judgment creditor'.

The decision of the Court of Appeal in *UMW Industries (1985) Sdn Bhd v. Lim Chee Hian* [2005] 1 CLJ 173; [2005] 1 CLJ 319 cited by the JD's counsel should be distinguished on the facts. In the *UMW Industries* situation, the request was stated to be by the corporation but no name of the officer was stated thereat, and neither was it made by the solicitors on record. It was there, on that particular fact scenario, that the court held that there was a contravention of r. 215 of Bankruptcy Rules, which provision required that any action (under the Bankruptcy Act) on behalf of a corporation by an officer must state that he had authority under seal to do so.

[4.1] I did not find that there was any confusion caused by stating on the request in this case that the JC (the Corporation) was the applicant while the form being signed for on behalf of the entity by an identified firm of solicitors. The fact that the signatory on behalf of the identified firm of solicitors is not specifically named does not also, in my assessment, amount to a sufficient ground to strike down the request and consequently, the BN itself. The names of the JC and of the JC's solicitors had been provided and their identities were not in any doubt.

[5] As regards the creditor's petition, the JD's contention was that it was not sufficient for the officer of the petitioner signing the creditor's petition to just say he was an authorized officer to do so. It was argued that he should state he had authority under seal and further show proof of such authority for the CP to be held to be valid.

It was my finding that the declaration by Aznan b Adnan that he was an authorized officer of JD with his designation or office in JC clearly spelt out, as was available in this case, was sufficient in all the circumstance to satisfy r. 215 of the Bankruptcy Rules. The Bankruptcy Rules does not anywhere require proof of the 'authority under seal' to be made available at that stage.

If however deponent's authority was challenged, as was in this case, then it would be incumbent upon the JC to show proof of the authority of the person who had signed the creditor's petition. This has been satisfied in our case and I held there was no merit in this line of challenge as well, here to strike down the petition.

[6] In so far as the attack by the JD on the 'affidavit verifying petition' was concerned, the thrust of the argument was that the creditor's petition itself should have been attached to the affidavit verifying petition, laying emphasis on the words - 'annexed' - used in the affidavit. In Form 11 of the Bankruptcy Rules, ('affidavit of truth of statements in petition') in the opening lines of the suggested format, we find the following terminology:

> I, the petitioner named in the petition hereunto annexed, affirm ... and say: ...

[6.1] This issue was considered in three cases. In *Ooi Thean Chuan v. Banque Nationale de Paris* [1992] 2 CLJ 1225; [1992] 3 CLJ (Rep) 160, Edger Joseph Jr J (as he then was), held that r. 106 of the Bankruptcy Rules, and Form 11 prescribed therein, required the petition to be annexed to it. It was explained in that case that the petition (CP) must be tied to or bound to or attached to or joined to or affixed to or stapled to the verifying affidavit, so as to avoid any dispute as to what exactly is being verified. It was held there that failure to annex the petition went beyond mere irregularity and rendered the proceedings a nullity.

The decision of Kamalanathan Ratnam, J in *Cho Yu-Lon v. Arab-Malaysian Finance Bhd* [2003] 2 CLJ 186 followed *Ooi Thean Chuan* and held that a copy of the petition (CP) introduced as an exhibit to the affidavit and stapled to the affidavit would suffice to meet the requirements of r. 106 and Form 11.

[6.2] On the other hand Kang Hwee Gee, J (as he then was) in *Re Puan Sri Mona Kishu Thiratrai ex-parte Affin Bank Bhd* [2007] 7 CLJ 657, held that the omission to annex the creditors petition to the affidavit verifying petition was a 'minor infraction' which did not go to the substance of the affidavit (merely a defect in form only) and that did not make the petition ineffective.

[6.3] In our instant case the 'affidavit mengenai kebenaran pernyataan-pernyataan dalam petisyen' (encl. 6) did not attach or annex a copy of the creditor's petition at all.

After giving due consideration to the rationales propounded in the differing judgments above, I preferred the reasoning of Edgar Joseph, J (which had been followed by Kamalanathan Ratnam, J) to that of Kang Hwee Gee, J. I held that the affidavit verifying petition in our instant case did not comply with the requirements of the Bankruptcy Act and the Bankruptcy Rules. Further, this was not corrected by the JC although it could have been done.

[6.4] As to the use of the words 'mengaku' dan 'mengikrar' in separate places but in the same affidavit, I did not agree with counsel for the JD that this had caused confusion or had the effect of nullifying the affidavit verifying petition. I was of the view that even if this was a 'defect', it was merely one of form only, and not one which went to the substance of the affidavit. Affidavits could be made either by affirmation or by swearing to the contents thereof.

The omission to annex the creditor's petition to the affidavit verifying petition on the other hand, was a matter that went to the materiality of the contents and hence a substantive matter.

[7] It was the JD's further contention that the sum stated to be owed by the JD both in the bankruptcy notice and the creditors petition was inaccurate and not the sums at all adjudged against the JD in KL High Court Guaman No. D3-22-1580-2006 proceedings. Counsel for JD's argument was that the 'penghakiman' of 18 November 2008 annexed to the bankruptcy notice was a judgment entered jointly against the three defendants there. It was not a joint and several judgment and the liability of the JD was only to the extent of one-third that adjudged amount in any event. He submitted that the creditor's petition should be struck out on that basis in any case.

[7.1] I have perused the certified true copy of the said 'penghakiman' made on 18 November 2008 and attached to the bankruptcy notice. There is nothing in the said judgment to show that the three defendants named there (one of whom was the JD) was adjudged to be jointly and severally liable to pay the judgment sum to the JC (the plaintiff there).

In the absence of the judgment spelling out expressly that the defendants were jointly and severally liable to the plaintiff, the judgment there has, as in the ordinary course, to be a judgment imposing joint liability or obligation on the three defendants to meet the judgment sum together. In such event the JD's obligation is only one-third the amount of the judgment sum and not as set out in the bankruptcy notice, or for that matter in the creditor's petition.

A similar issue had arisen in the case of *Yeo Ah Wang lwn. UMBC Bhd* [1995] 1 AMR 38 and Shaik Daud, J (as he then was) held there that where the judgment had been obtained against all three defendants and they were jointly liable, the notice of bankruptcy could not be issued against one defendant only based on that whole of the judgment sum.

[8] Accordingly, I found that there were merits on two of the grounds relied by the JD in his application to set aside the bankruptcy notice and/or creditor's petition. They were namely:

A (a) the affidavit verifying petition was defective in not annexing, or in any other manner attaching, the creditor's petition to the said affidavit (consequently the creditor's petition here could not therefore be prosecuted further), and

B (b) the sum claimed to be owing by the JD on the face of the creditor's petition was not the sum due which was recoverable from the JD on the joint judgment entered by the JC against JD and the two other individuals in Guaman No: D3-22-1580 of 2006.

[9] On those grounds, I allowed the appeal of the JD and struck out C the creditor's petition. The JC was ordered to pay JD a sum of RM3,000 as fixed costs here and below.

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